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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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ERWIN RAUTENBERG, ET AL., PETITIONERS

*v.*

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES OF AMERICA, ET AL., REAL PARTIES IN INTEREST)

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying a petition for a writ of mandamus directing the district court to vacate a protective order limiting petitioners' dissemination of information protected by the state secrets privilege that they obtained in the course of civil discovery.

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### OPINIONS BELOW

The orders of the court of appeals (Pet. App. C, D) are not yet reported. The order of the district court maintaining in force a previously issued protective order (Pet. App. B) is not yet reported. The protective order is under seal and is not reported.

### JURISDICTION

The judgment of the court of appeals denying the petition for a writ of mandamus was entered on February 13, 1991. Pet. App. C. On April 1, 1991, the court of appeals, upon reconsideration, again denied mandamus. Pet. App. D. A petition for rehearing was denied on April 29, 1991. Pet. App. E. The petition for a writ of certiorari was filed on July 29,

1991 (a Monday). See page 7, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The background of this private civil action is described in *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 179-180 (9th Cir. 1989), cert. denied, 493 U.S. 1058 (1990). Plaintiff/petitioner Air-Sea Forwarders (Air-Sea), of which petitioner Rautenberg is the President, alleges that in the 1950s, defendant Air Asia Co. arranged for Air-Sea's services as a freight-forwarder and customs broker. Air-Sea further alleges that Air Asia entered into an oral contract in 1956 providing that this arrangement could be terminated only for good cause. At that time, Air Asia was secretly owned and controlled by the Central Intelligence Agency. In 1975, however, the CIA sold Air Asia to defendant E-Systems, Inc., a private corporation. In 1981, Air Asia selected another freight forwarder. Air-Sea then brought this suit against E-Systems and Air Asia in the United States District Court for the Central District of California, alleging wrongful termination of the contract.

Air-Sea sought extensive discovery of the two private defendants and certain matters of interest to the United States. On November 5, 1984, defendant E-Systems sought to limit the scope of Air-Sea's discovery by moving for a protective order under Rules 26(b), 26(c)(4) and 26(c)(7) of the Federal Rules of Civil Procedure. In papers filed on the public record and served on Air-Sea's counsel, E-Systems argued that much of the discovery sought by Air-Sea was not reasonably calculated to lead to admissible evidence. In addition, E-Systems argued that certain information sought by Air-Sea constitutes confidential business information or trade secrets that are privileged from disclosure.

Shortly thereafter, the United States, in an *ex parte, in camera* hearing, presented to the district court several classified declarations supporting E-Systems' motion for a protective order. Air-Sea had served a subpoena seeking information on a wide range of the United States' intelligence related activities, including the manner in which it transports armaments and espionage equipment, confidential relationships with certain private entities, and certain current and past dealings with Asian and Middle Eastern countries. The government's declarations represented that some of the discovery sought by Air-Sea concerned highly sensitive, privileged information whose disclosure would cause grave, immediate, and irreparable harm to the national security of the United States. The declarations then noted that, as E-systems had argued, discovery of such matters could be barred solely on relevance grounds. But they also represented that, in light of the potential for serious injury to national security interests, some of the information sought by Air-Sea would be protected by the state secrets privilege and by specific privileges arising out of two statutory provisions protecting intelligence information.

On November 6, 1984, the district court granted E-Systems' motion and issued a protective order limiting the scope of discovery and evidence that could be adduced at trial. The court found that the information E-Systems sought to protect constituted confidential research, development, and commercial information, and that the information was in any event irrelevant to Air-Sea's claims. In addition, the court expressly found that the information of interest to the United States constituted sensitive national security information that would be subject to a formal claim of state secrets privilege and that was protected from disclosure by several statutory provisions.

The court accordingly directed that no discovery be had and that no evidence be adduced at trial concerning certain contacts with foreign governments and certain information pertaining to whether a confidential relationship existed between the United States and a specified private entity.

In addition, the court took several steps to protect sensitive information reflected in the protective order itself. First, although the court permitted petitioner Rautenberg and counsel for Air-Sea to read the order, it concluded that the order itself is classified and could not be physically retained by either Rautenberg or counsel. Instead, the court instructed the government to maintain the order under seal and in appropriate security containers. Second, the court directed that no party to the litigation may disclose publicly the terms of the order or the United States' participation in the litigation, except insofar as that information appears on the public record. The order, which was amended in certain respects on November 21, 1985,[1] remains under seal.

2. After a trial on the merits, the jury returned verdicts in favor of Air-Sea in the amounts of $216,151.50 in compensatory damages for breach of contract and $6 million in punitive damages for bad faith denial of the existence of a contract. The district court, however, subsequently granted the defendants' motion for judgment n.o.v. on the bad faith claim and their motion for a new trial on the breach of contract claim. 880 F.2d at 181.

Air-Sea appealed the judgment n.o.v. to the Ninth Circuit, pursuant to Fed. R. Civ. P. 54(b). 880 F.2d

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[1] Petitioners erroneously identify the date of the amendments as November 21, 1991. See Pet. 5. The amendments included the addition of the exception to the non-disclosure provision where the United States' interest in the litigation appears on the public record.

at 179 n.1. It did not, however, challenge the validity of the protective order. *Id.* at 192. Air-Sea's appellate brief nonetheless noted that the government had sought a protective order after being informed that discovery requests would implicate classified information relating to a putative relationship between a private entity and the United States. Consistent with the terms of the protective order and its interest in keeping the underlying information confidential, the United States moved that those references be redacted from the publicly filed briefs. The court of appeals granted the government's motion. On the merits, the court of appeals reversed the judgment n.o.v. and remanded for a new trial. *Id.* at 181-191. The court stated in its published opinion that the United States had appeared in the litigation and had obtained a protective order regulating the admission of certain classified evidence. *Id.* at 192. The court did not, however, disclose the specific terms and conditions of the protective order or the details of the underlying information.

3. On April 6, 1990, petitioners, in the course of preparing for the new trial, filed in the court of appeals a petition for a writ of mandamus directing the district court to vacate the protective order. Petitioners filed the mandamus petition under seal. On June 1, 1990, the court of appeals issued an order stating that the petition would be granted unless the government submitted to the district court a certification supporting a claim of the state secrets privilege in accordance with the procedures described in *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953). The court of appeals instructed the district court to rule on the privilege and the continuing validity of the protective order, and it retained jurisdiction to review the district court's ruling, which it directed the government

to file with the court of appeals under seal. Pet. App. A1-A2. In addition, the court of appeals, *sua sponte*, stated that its order "shall be filed under seal, and counsel for petitioners shall not reveal [the] order or its contents to anyone not a party to this litigation." *Id.* at A2.

4. On June 29, 1990, the appropriate Executive Branch officer filed with the district court, under seal, a declaration asserting a formal claim of state secrets privilege with respect to information pertaining to the nature, scope, or extent of any governmental relationship with a specified private entity. C.A. Supp. Emergency Petition for Mandamus, Exh. A. The government also filed, under seal and *ex parte*, two additional classified declarations that further detailed the character of the information subject to the privilege and the reasons why disclosure would harm the national security. Pet. App. B2. On August 20, 1990, the district court sustained the government's invocation of the state secrets privilege and the validity of the protective order, *id.* at B1-B5, finding the order to be no more restrictive than necessary to protect the privileged information. *Id.* at B3.

5. On October 11, 1990, petitioners filed in the court of appeals a supplemental petition for a writ of mandamus directing the district court to vacate the protective order or, in the alternative, to modify its restrictions. The court of appeals denied the petition without opinion, citing this Court's opinion in *United States* v. *Reynolds*, *supra*, and its own in *Bauman* v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977), which discusses the standards for obtaining mandamus relief. Pet. App. C1-C2, D1-D2. The court of appeals denied petitioners' petition for rehearing with suggestion of rehearing en banc. Pet. App. E1-E2.

6. On July 29, 1991, petitioners filed a petition for a writ of certiorari and a motion for leave to file the petition under seal. In our October 23, 1991, response to petitioners' motion to file under seal, we stated that the government's interest in preserving the confidentiality of privileged information could be adequately protected by deleting certain material from the certiorari petition (thereby permitting public filing of a redacted copy), if the Court maintained under seal the unredacted petition and any portions of the record or pleadings containing information covered by the state secrets privilege established below. We appended to our response to the motion a redacted copy of the petition that in the judgment of responsible officials could, consistent with the national security, be filed on the public record. Petitioners then filed a new motion to file the certiorari petition, as redacted by the government, on the public record and to file the unredacted petition under seal. On December 3, 1991, the Court granted petitioners' motion.

## ARGUMENT

The court of appeals did not abuse its discretion in declining to issue a writ of mandamus to compel the lifting or modification of a protective order entered by the district court to maintain the confidentiality of information that it found to be protected by the state secrets privilege. The court of appeals' brief orders do not conflict with any decision of this Court or of another court of appeals, and do not warrant review by this Court.

This Court has stressed that a writ of mandamus is an extraordinary remedy, warranted only where necessary "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

*Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Accordingly, an applicant for mandamus must demonstrate that there is no other adequate means of obtaining the desired relief, and that his right to issuance of the writ is "clear and indisputable." *Mallard* v. *United States District Court*, 490 U.S. 296, 309 (1989). Moreover, issuance of the writ is largely committed to the discretion of the court to which the petition is addressed. *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Petitioners ignore these limitations on the relief they sought below.

1. Petitioners had, but chose to forgo, an alternative avenue for challenging the protective order: their prior appeal from the final judgment n.o.v. in favor of Air Asia on the bad faith termination claim. See *United States* v. *Caparros*, 800 F.2d 23 (2d Cir. 1986) (protective order allegedly infringing First Amendment rights appealable upon entry of final judgment); *In re National Mortgage Equity Corp.*, 849 F.2d 1166 (9th Cir. 1988) (discovery order implicating privilege ordinarily appealable upon entry of final judgment). Petitioners argued below that they could not have sought review of the protective order in their prior appeal because: (1) the Rule 54(b) order did not certify the protective order for appeal (see Petitioners' Reply in Support of Emergency Petition For Writ of Mandamus at 31); (2) the protective order was not part of the record on appeal because it was not maintained by the district court clerk (*id.* at 31, 43); and (3) petitioners Rautenberg and Steinberg were not parties to the underlying civil action, and therefore lacked standing to challenge the protective order (*id.* at 33).

Petitioners' efforts to explain away their prior default are unavailing. First, a judgment certified pur-

suant to Fed. R. Civ. P. 54(b) is final for purposes of 28 U.S.C. 1291. *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956). An appeal thus permits appellate review of all interlocutory orders leading up to entry of judgment. Second, the fact that the protective order was not in the physical custody of the district court clerk had no bearing on the court of appeals' authority to review it. Under Fed. R. App. P. 10(a), the record on appeal consists of all papers filed in the district court, not merely those within the custody of the district court clerk. See also Fed. R. App. P. 10(e); cf. Security Procedures Established Pursuant to Pub. L. No. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, §§ 7(c), 10 (18 U.S.C. App. 9 note) (in criminal cases, classified materials may be maintained by Executive Branch agency and later transmitted to reviewing court as part of record on appeal). Third, petitioners Rautenberg and Steinberg, who are Air-Sea's president and counsel, respectively, presumably could have caused Air-Sea to raise the protective-order issue on appeal; if Air-Sea had prevailed, that relief would have redounded to their benefit. Moreover, if Rautenberg and Steinberg believed that Air-Sea's appeal would not vindicate their personal interests in overturning the protective order, they could have intervened in the civil action after entry of judgment, for the purpose of taking an appeal. See *Bryant* v. *Yellen*, 447 U.S. 352, 366 (1980).

There is, moreover, no doubt that the validity of the protective order was germane to petitioners' appeal on the merits. Indeed, petitioners argued that the government's efforts to secure the protective order had prejudiced the district court's view of the evidence and improperly influenced the court in its deci-

sion to enter judgment n.o.v. See 86-6683 Appellant Air-Sea Forwarders Br. at 5-6, 27, 45 (9th Cir.). Yet as the court of appeals pointed out on that appeal, they chose not to contest the validity of the protective order or avail themselves of the opportunity to rectify what they now assert are infringements of their constitutional rights. 880 F.2d at 192. Rather, petitioners waited until *after* the case was remanded to the district court—and until the eve of a new trial —before challenging the order in the court of appeals. Issuance of a writ of mandamus in such circumstances would encourage the waste of judicial resources, subject defendants to the unfair burden of responding to a series of appellate challenges to pretrial rulings, and frustrate the principle that extraordinary writs should not needlessly contribute to piecemeal appellate litigation. See, *e.g.*, *Kerr*, 426 U.S. at 403; *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980). For this threshold reason alone, the court of appeals acted well within its discretion in denying relief.

2. In addition, a writ of mandamus may issue only if the petitioner demonstrates a clear and indisputable right to the writ; simple error will not suffice. Put another way, the petitioner must show that there was an abuse of discretion amounting to a naked usurpation of judicial power. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-384 (1953). This burden is particularly difficult to carry with respect to orders regulating discovery. The Court has made clear that Fed. R. Civ. P. 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required," and it has stressed that "[t]he unique character of the discovery process requires that the trial court have substantial latitude

to fashion protective orders." *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 36 (1984). Such discretionary determinations are especially ill suited for mandamus review, for "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corp.*, 449 U.S. at 36.

Petitioners nonetheless argue that the district court's order is erroneous, not because the trial court lacked discretion to regulate discovery or the evidence at trial, but because the order assertedly trenches on their rights under the First and Fifth Amendments.[2] These claims are meritless.

a. Petitioners first contend (Pet. 8-13) that the protective order violates the Due Process Clause of the Fifth Amendment because, while they are faced with the possibility of contempt sanctions for violating the order, they are assertedly unable to ascertain what the order requires of them. This contention is belied by the record.

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[2] Petitioners also include (Pet. 3) the Seventh Amendment among the statement of constitutional provisions involved. They do not, however, mention the Seventh Amendment in the question presented or argue in the body of the petition that the protective order violates their Seventh Amendment rights. Nor could they plausibly do so. This Court has held that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1981) (quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1876)). Thus, assertion of a state secrets privilege may warrant dismissal of an entire case if the matter cannot be resolved without disclosure of privileged information. *Reynolds*, 345 U.S. at 7-8. Such a dismissal does not violate a party's right under the Seventh Amendment (where it applies) to have whatever substantive claim is *not* dismissed tried to a jury.

Petitioners rely (Pet. 9, 11-12) on decisions holding that a person may not be subjected to a deprivation of liberty or property based on his failure to comply with a law whose meaning is impermissibly vague (citing *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); see also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 629 (1984)) or be held in contempt for violating a judicial order that is not drafted with sufficient clarity to permit compliance (citing *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967)). At bottom, however, petitioners do not rest their due process claim on the proposition that the protective order itself is "inherently vague." See Pet. 12, 13. Rather, they argue that because they assertedly lack access to the protective order, "[t]he result is the same" as if the order itself were vague.[3] Petitioners' assertion that they have not been adequately apprised of the obligations imposed by the protective order is utterly without merit.

First, petitioner Rautenberg was presented with a copy of the order one day after it was issued. He read the order with counsel at his side and, consistent with the district court's instructions, acknowledged by his signature that he had done so. C.A. Emergency Petition For Writ of Mandamus at 48-49.

Second, when Rautenberg later maintained that a medical condition had caused him to forget the pro-

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[3] Petitioners suggest in a footnote that the order "appears" to suffer from the vice of vagueness as well, but assert that "the limits on access to it preclude the careful study required to determine this with certainty." Pet. 13 n.2. As we explain in the text, however, petitioners' access to the protective order has been more than sufficient to demonstrate to them that the order is not inherently vague.

tective order's requirements, government counsel took additional steps to ensure that he remained adequately apprised of its terms. Thus, government counsel deposed Rautenberg and again presented him with a copy of the protective order. Gov't C.A. Response to Emergency Petition For Writ of Mandamus, Attachment D, at 6-10. Counsel then asked Rautenberg to reread the protective order and inquired whether he understood its terms. Rautenberg, who was represented at the deposition by petitioner Steinberg, responded that he understood each pertinent page of the court's order. *Ibid.* Rautenberg also stated that he understood that he could inspect the protective order again if, at any time in the future, he was unable to recall its terms. *Id.* at 5.

Third, the protective order is and has been available for inspection by Rautenberg's trial counsel upon reasonable request to the Office of the United States Attorney for the district in which Air-Sea's civil action is proceeding. See C.A. Emergency Petition For Writ of Mandamus at 108. At least *seven* of Air-Sea's attorneys, including petitioner Steinberg, have reviewed the order under these procedures, and the district court has permitted additional counsel to be granted access to the order for good cause shown. C.A. Gov't Response to Emergency Petition For Writ of Mandamus, Attachment C, at 3-4.[4]

Finally, the text of the protective order is unambiguous and affords precise notice of the obligations it imposes upon petitioners. It focuses on preserving the confidentiality of information concerning the

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[4] Petitioners state (Pet. 22) that their appellate counsel were denied access to the order, but fail to identify any instance in which those attorneys requested that the district court permit them to inspect it.

existence, nature, and scope of a classified relationship with one, specifically identified private party. Indeed, Rautenberg stated at his deposition that he understood each of the order's provisions, and made no claim that it was vague or imprecise. C.A. Gov't Response to Emergency Petition For Writ of Mandamus, Attachment D, at 7-10.

b. Petitioners also contend (Pet. 14-22) that the protective order violates their First Amendment rights. They principally complain (Pet. 14-19) that the protective order prevents public disclosure even of the existence of the order and of the fact that the government intervened in the litigation to obtain it. Those issues, however, are now moot. By the terms of the protective order itself, disclosure of that information is barred only insofar as it is not a matter of public record. The Ninth Circuit, in its published opinion rendered on petitioners' appeal, has already disclosed (presumably inadvertently) that the district court was in communication with government lawyers concerning the role of classified information and that the district court issued a protective order regulating the admission of classified evidence. 880 F.2d at 192. Because that information is now a matter of public record, petitioners are no longer barred from discussing it. It is for this reason that we represented in our response to petitioners' motion to file the certiorari petition under seal that the government did not object to the public filing of a redacted version of the certiorari petition. And petitioners subsequently made a public filing of the redacted petition, which of course constituted a public disclosure of its contents.[5]

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[5] Petitioners' stated interest in ensuring that the public is made aware of the protective order and the government's efforts to obtain it (see Pet. 14, 16, 17, 22) has also been

At this point, then, the protective order guards only the contents of the order, not its existence and the government's role in securing it. This Court's decisions make clear that the government may preserve the confidentiality of judicial proceedings to further the proper functioning of the judicial system or to prevent public disclosure of certain sensitive information not already in the public domain. See, *e.g.*, *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 534-535 (1989); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 845 (1978); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979). In this case, the state secrets privilege, which the district court found to have been properly invoked, protects information the disclosure of which would cause grave, immediate, and irreparable harm to the national security of the United States. To ensure that the government would not be required to respond to petitioners' attempt to subpoena such information, the government secured a judicial order. That order itself necessarily contains privileged information in its description of what is protected from disclosure. The mere fact that privileged information is, as a result, reflected in a judicial order does not require that the court make it available for public scrutiny.

Petitioners also err in asserting (Pet. 14-15, 16, 18) that they obtained the information at issue (principally, knowledge of the existence of the protective order) independent of the discovery process, and that the

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served, since that information has been reported in several articles discussing the various suits in which Air-Sea and Rautenberg have been involved with Air Asia. See *In From the Cold: A Suit Makes Public An Old CIA Tale*, National Law Journal 1, 10-11 (Mar. 2, 1992); *A Rare Look at a Sealed File*, *id.* at 10.

First Amendment therefore precluded the court from imposing a prior restraint on its dissemination. The court imposed the protective order in the course of reviewing the United States' request to limit the scope of the discovery sought by petitioners. By defining the scope of the government's privilege against that discovery, the protective order necessarily identified a putative relationship between the United States and a specified private entity. Petitioners apparently had no independent source of that classified information.[6] Indeed, petitioners asserted below that they "flatly do not possess any 'classified' information" (C.A. Supplemental Emergency Petition For Writ of Mandamus at 27 n.11), and they insist in this Court that Rautenberg "has no knowledge of any classified information, and never had any access to such information" (Pet. 9 n.1).

Although the First Amendment narrowly limits a court's power to restrain dissemination of information lawfully obtained through independent means, courts have substantially greater power to limit disclosure of information obtained by a party solely

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[6] Petitioners erroneously suggest that the existence of a classified relationship is public knowledge. See Pet. 16, 19-20. That is not so. The published judicial decision they cite, for example, concerned a public, unclassified contract. The cited newspaper article merely speculates as to the roles of various private parties in aiding intelligence-gathering activities. And the cited reports do not address any current activities, but instead concern events prior to 1975, before the CIA divested itself of Air Asia. The existence of a continuing, classified relationship between the government and the private entity identified in the protective order may well be the topic of public speculation, but, contrary to petitioners' contentions, it is not a matter of public record. Cf. *Salisbury* v. *United States*, 690 F.2d 966, 971 (D.C. Cir. 1982); *Afshar* v. *Department of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

through participation in discovery and other judicial proceedings. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984); *Gentile* v. *State Bar*, 111 S. Ct. 2720, 2744-2745 (1991); *Butterworth* v. *Smith*, 494 U.S. 624, 631-632 (1990); accord *Doe* v. *State of Florida Judicial Qualifications Comm'n*, 748 F. Supp. 1520, 1529 (S.D. Fla. 1990). Thus, in *Seattle Times*, the Court reasoned that "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny," and further noted that "continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." 467 U.S. at 32, 33. The Court also recognized that the government has a substantial interest in ensuring that the discovery process is not abused in a manner that injures third parties. *Id.* at 34-35. For these reasons, the Court held in *Seattle Times* that a protective order limiting dissemination of information acquired in discovery does not violate the First Amendment if it: (1) furthers a substantial governmental interest unrelated to suppression of expression; (2) does not restrict dissemination of information gained from sources outside discovery; and (3) is entered on a showing of good cause as required by Rule 26(c) of the Federal Rules of Civil Procedure. 467 U.S. at 32, 37. The order at issue here satisfies each of those criteria.

First, there is a compelling interest in preserving the confidentiality of the contents of the protective order. The mere assertion of a national security privilege with respect to particular information may itself impart classified information regarding the government's activities. See *CIA* v. *Sims*, 471 U.S. 159,

177 (1985); *Miller* v. *Casey*, 730 F.2d 773, 775-776 (D.C. Cir. 1984). The government should not be put to the choice of either forgoing that assertion or disclosing, in the course of establishing the privilege, the very information it seeks to protect. Cf. *Reynolds*, 345 U.S. at 8 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." (footnotes omitted)).

Second, the protective order's nondisclosure provisions apply only to the classified relationship that is the subject of the government's state secrets privilege, and do not extend to information that is a matter of public record. As the district court stated, "[t]he thrust of the protective order is not directed to what [Rautenberg] knows. It's to keep him from knowing some things in discovery that he should not know." C.A. Emergency Petition For Writ of Mandamus at 84.

Finally, there plainly was good cause for the order issued below. The government demonstrated to the district court's satisfaction that disclosure of the information in question would cause serious damage to the national security. The protective order is drawn to safeguard that interest without unduly infringing on petitioners' freedom of expression.

3. In sum, petitioners have wholly failed to show that the district court "clearly and indisputably" exceeded its discretion in fashioning protection for classified and privileged information in the discovery context, or that the court of appeals abused its discretion in denying their petition for the extraordinary relief of mandamus. The denial of relief in the particular circumstances of this case does not warrant review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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